No. 3

In the Supreme Court of the United States

OCTOBER TERM, 1951

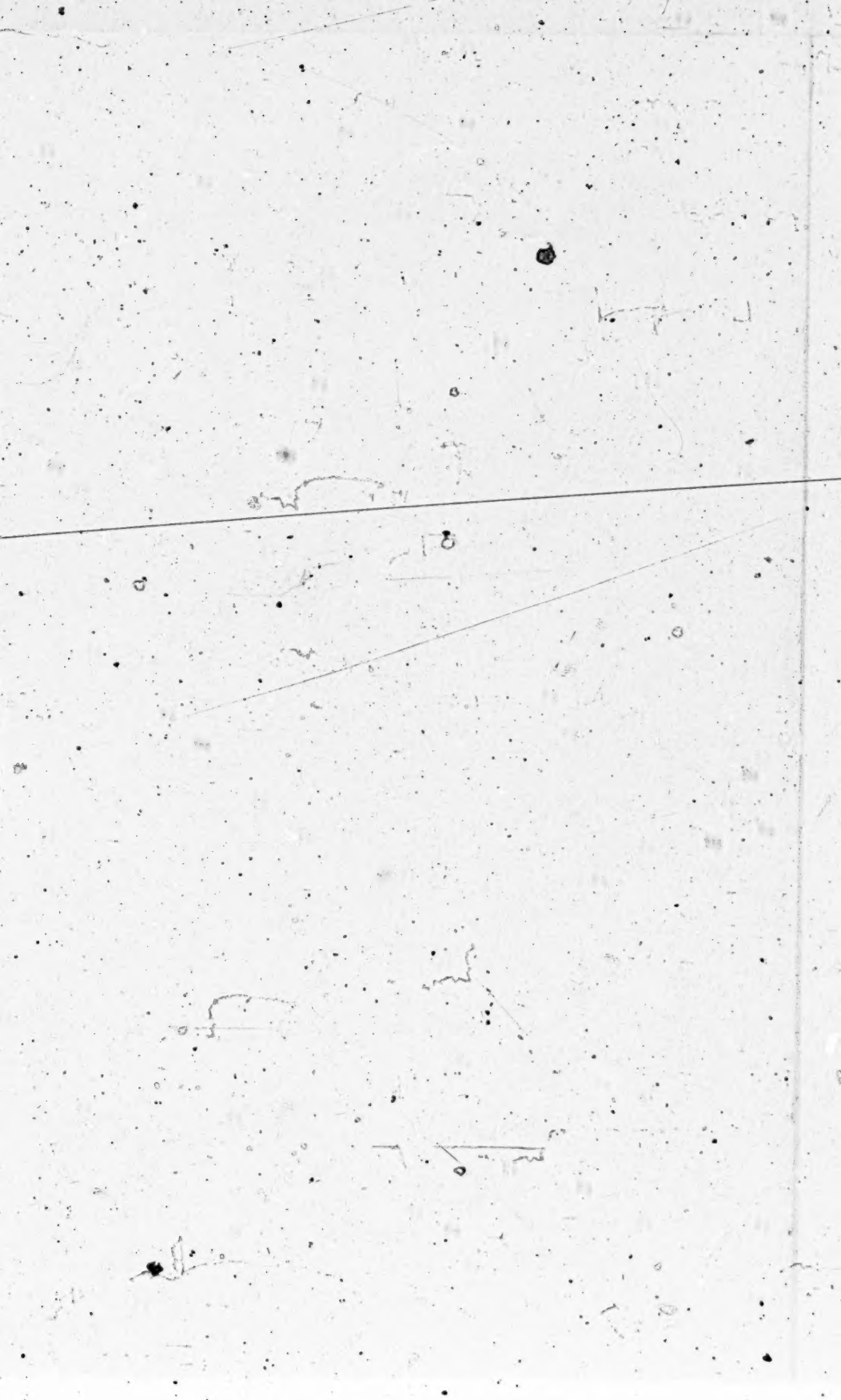
UNITED STATES OF AMERICA, PETITIONER

v.

JESSE W. JEFFERS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES



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OPINIONS BELOW

The opinions in the Court of Appeals (R. 39-59) are reported at 187 F. 2d 498.

JURISDICTION

The judgment of the Court of Appeals was entered December 7, 1950 (R. 60). On January 4, 1951, by order of the Chief Justice, the time within which to file the petition for a writ of certiorari was extended to and including January 26, 1951 (R.

61). The petition for a writ of certiorari was filed January 26, 1951, and was granted March 26, 1951 (R. 62). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether respondent was entitled to have excluded from evidence contraband narcotics, ownership of which he claimed, in a case in which the narcotics had been seized in the apartment of other persons in the course of a search without a warrant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

21 U.S.C. 174:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing

the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

26 U.S.C. 2553(a):

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

26 U.S.C. 2557(b)(1):

Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than

$2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

26 U.S.C. 2558(a):

All unstamped packages of the drugs mentioned in section 2550(a) found in the possession of any person, except as provided in this subchapter, shall be subject to seizure and forfeiture, and all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subchapter and the persons upon whom the taxes under this subchapter or part V of subchapter A of chapter 27 are imposed.

26 U.S.C. 3116:

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228 (U.S.C., Title 18, §§ 611-633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or

property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

STATEMENT

Respondent and James M. Roberts were charged in a two-count indictment (R. 1) with violations of 26 U. S. C. 2553(a) and 21 U. S. C. 174, *supra*. At the trial before the court, a jury having been waived and a severance granted as to respondent (R. 16), certain narcotics not bearing tax-paid stamps were introduced in evidence over his objection (R. 24, 26-27, 30). Prior to the trial, the court had denied a motion by respondent, who claimed ownership, to suppress these narcotics as evidence (R. 2, 15).

The evidence on this issue showed that Roberts, a known narcotics dealer with a record of previous narcotic convictions, offered $500 to Herbert Scott, the house detective of the Dunbar Hotel in Washington, D. C., to let him into a room in the hotel (also called an apartment) occupied by respondent's aunts. Roberts told Scott that respondent had "some stuff stashed" there. (R. 18-19.) After stalling Roberts by telling him to call back later, Scott informed Lieutenant Karper, in charge of the Narcotics Squad of the Metropolitan Police, of this occurrence (R. 19, 21, 23). Karper and

Scott obtained from the assistant manager a key to the room, which they entered without a search warrant or warrant of arrest (R. 20, 21-22, 23). Karper testified that he did not take Scott before a magistrate to apply for a search warrant because he "wanted to get in that room and get that cocaine before it disappeared" and he "had no time to send out for help" (R. 29). In the room they found on the top shelf of a closet a pasteboard box containing 19 bottles of cocaine, 17 of which had no tax-paid stamps on them, and one bottle of codeine without a tax stamp (R. 23). Respondent, arrested the next day under a warrant of arrest, admitted that the narcotics were his and that he had placed them in the room (R. 26).

The hotel room where the narcotics were seized was rented and occupied by two of respondent's aunts. They paid the rent and theirs were the only names listed on the hotel ledger for that apartment (R. 8, 13, 20). Respondent occupied another room on a different floor of the hotel. Since the aunts paid for the care of his child who lived at another place, he was given a key to their room in order to enter while they were away to leave money for the child's care. (R. 9-10, 21.) One of the aunts testified that respondent was not given permission to store narcotics in their apartment, and she was not aware that he had done so (R. 11).[1]

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[1] One of the aunts, Louise Jeffries, testified as a defense witness at the hearing on the motion to suppress (R. 7-13). It was stipulated that if the other aunt were called, her testi-

The trial court found respondent guilty as charged and sentenced him to imprisonment for a term of four months to a year and a day (R. 31-32).

The Court of Appeals, one judge dissenting, reversed the conviction on the ground that the evidence of the seized narcotics should not have been admitted (R. 45). The majority said that "not only was the search unlawful; so also was the seizure." While conceding that an "accused does not have standing to prevent the admission of evidence obtained by an unlawful search and seizure which did not infringe his own personal rights protected by the Amendment" and that "the premises were not [respondent's]," the majority were of the view that "the question of his standing to object to the evidence turns upon his claim of ownership of the evidence seized rather than upon an interest in the premises searched." (R. 41.) They held "the correct rule to be that one who seasonably objects to the use in evidence against him of property he owns which has been seized as the fruit of unlawful search or otherwise in violation of the Fourth Amendment is entitled to its exclusion though the premises searched were not his" (R. 43); that the statutory provisions that unstamped narcotics are subject to seizure and for-

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mony would be to the same effect (R. 12-13). At the trial it was stipulated that the testimony of Miss Jeffries would be considered part of the record of the trial (R. 31).

feiture [2] and no property rights shall exist in them [3] were not intended to change the exclusionary evidence rule (R. 43-44); and that for "purposes of standing to object to its admission in evidence, [respondent] was the owner of the property" (R. 45).

Judge Stephens, concurring, said in addition that the "provisions of Section 3116 of Title 26, U. S. C. do not automatically forfeit property rights in narcotics intended for use in violation of the Internal Revenue laws" (R. 46).

The dissenting judge agreed with the majority "that objection may be made by one who owns property seized, as well as by one who owns or possesses the premises searched" (R. 58), but he thought that, since the search violated no right of respondent's and was therefore not unconstitutional as to him, and since the unstamped narcotics were contraband and instrumentalities of crime, they were subject to summary seizure. His conclusion was that "where contraband goods are concerned the only protection afforded by the Fourth Amendment is to a person and to premises, the protection in the latter instance being afforded to the owner or possessor only. My view is that a seizure of unstamped narcotics is not unreasonable, so long as no premises and no person are illegally invaded. Apart from his premises and his person,

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[2] 26 U.S.C. 2558(a), *supra*, p. 4.
[3] 26 U.S.C. 3116, *supra*, p. 4.

no individual has a protected property right in unstamped narcotics." (R. 58.)

SUMMARY OF ARGUMENT

I

A. In the federal courts it is settled law that, since the rights guaranteed by the Fourth Amendment are personal, only a person whose rights have been violated has standing to have illegally seized evidence suppressed. See *Goldstein* v. *United States,* 316 U. S. 114, 121. Evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used against the victim of the unlawful search and seizure for the reason that otherwise the Fourth Amendment would give him little protection. Suppression of evidence wrongfully seized is a method of vindicating his constitutional right; it is not a means of disciplining police officers. It is a remedial measure, not a punitive one. Since the right protected by the Fourth Amendment is personal, the suppression rule, being an exception to the general principle that relevant evidence is admissible, is extended only far enough to protect the constitutional right of the particular person before the court.

B. Applying these principles in the instant case, it is clear that the search of his aunts' room did not invade respondent's privacy, and did not alone give him standing to have the evidence seized by the police officer suppressed as to him. Only the aunts

were dwelling in the room; they had rented it and were paying the rent. Respondent lived in another room. He had no possessory or proprietary interest in his aunts' room, was not residing there, and was not present when the search was conducted.

II

Since there was no invasion of respondent's privacy, the only significant act in relation to any possible rights of respondent was the bare seizure without a warrant of the contraband narcotics. While the victim of an illegal search has standing to suppress as evidence contraband seized in the course of the search, as even a wrong-doer has rights of privacy guaranteed by the Fourth Amendment, a claim of ownership of such contraband is not an interest entitled to protection under the Fourth Amendment. Throughout the years, at common law, and under the decisions of this Court and lower federal courts, it has consistently been held that the possessor of contraband has no protected right therein and that when the seizure of such property is unaccompanied by an invasion of personal rights, it may be made without a warrant.

A. At common law, anyone could seize contraband for the government and such seizure could not be made the foundation for an action for trespass. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310, 315-316; *De Gondowin* v. *Lewis*, 10 Ad. & E. 117 (K.B.

1839). The early cases recognized a distinction between a possible invasion of a personal right by the manner in which contraband was seized and the absence of such invasion in the act of seizing itself. Thus it was held that an action for trespass would lie for breaking and entering a house to take contraband goods but not for the taking of the goods. *Davis* v. *Nest*, 6 C. & P. 167 (K.B. & C.P. 1833).

B. The framers of the Fourth Amendment did not regard a warrant as necessary for the seizure of forfeited contraband. The First Congress, which proposed the first ten amendments to the state legislatures, passed two acts for the collection of duties which provided for the seizure of forfeited goods without a warrant. Acts of July 31, 1789 (1 Stat. 29), and August 4, 1790 (1 Stat. 145).

C. The courts have consistently upheld the seizure of contraband without a warrant where the claimant's right of privacy has not been unlawfully invaded. Thus, where an officer has lawfully come upon contraband he may seize it. *Harris* v. *United States*, 331 U.S. 145; *Steele* v. *United States No. 1*, 267 U.S. 498. Such a seizure is as much an invasion of the alleged property rights of the owner of contraband as a seizure where the officer, in order to reach it, has illegally searched the premises of a third party.

D. Congress has explicitly declared that there can be no property rights in contraband narcotics

(26 U.S.C. 3116, *supra*). In such case, the forfeiture takes place, and title passes to the Government, at the time the narcotics are acquired, the acquisition being an illegal act. *United States* v. *Stowell*, 133 U.S. 1; *Thacher's Distilled Spirits*, 103 U.S. 679; *Caldwell* v. *United States*, 8 How. 366; *United States* v. *1960 Bags of Coffee*, 8 Cranch 398. The seized narcotics were never respondent's "effects" within the protection of the amendment.

The seizure provisions of section 3116 of Title 26 do not require a warrant to justify the seizure of contraband; they apply only to the entry and search. *Steele* v. *United States No. 1*, 267 U.S. 498; *Harris* v. *United States*, 331 U.S. 145. The right to seize contraband is based on the common law right of the owner to take possession from a person illegally holding it (*Davis* v. *United States*, 328 U.S. 582, 591) and of anyone to seize forfeited contraband [redacted] 3 Wheat. 246, 310.

Once the principle is recognized that a person has standing to complain only of an invasion of his personal rights, it becomes clear that the seizure of the narcotics is not an act to which respondent has a right to object. He had no such interest in the contraband narcotics as to be able to claim the protection of the Fourth Amendment with respect thereto.

ARGUMENT

Although the precise issue involved in this case has never been decided by this Court, there are

several Court of Appeals decisions squarely in point and in conflict with the decision below. *Chicco* v. *United States*, 284 Fed. 434 (C. A. 4); *Grainger* v. *United States*, 158 F. 2d 236 (C. A. 4); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2). In these cases the courts refused to exclude evidence offered against defendants in situations where the premises illegally searched were owned or occupied by persons other than the defendants regardless of the defendants' claims of ownership of the articles seized. In this case it is not necessary to go as far as those decisions since here, not only did the defendant have no interest in the premises searched, but also the contraband nature of the narcotics seized eliminated any grounds for objection to the seizure as distinguished from the search.

The court below analyzed the case as involving two broad questions: (a) Did the illegality of the search of the apartment, which was rented by the respondent's aunts but not by him, form a basis for respondent's objection to the evidence? (b) Did the seizure of the narcotics, ownership of which was claimed by respondent, during the course of the search form a basis for respondent's objection to the evidence? All the judges of the court below answered the first question in the negative.

I

The Illegality of the Search of an Apartment Occupied by Persons Other Than the Respondent Was Not Ground In Itself for Exclusion of the Evidence Obtained in the Course of the Search

A. *Only a person whose rights under the Fourth Amendment have been violated has standing to object to the admission of evidence obtained in the course of an illegal search.*—Since this Court first held in *Weeks* v. *United States*, 232 U. S. 383, that, in a federal prosecution, the Fourth Amendment barred the use of evidence secured by federal officials from the accused through an illegal search and seizure, the federal courts have, with unanimity, held that the rights protected by the Fourth Amendment are personal, and that the doctrine applies only to those whose rights of security in property or person were violated by the illegal search or seizure.[4]

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[4] All the Courts of Appeals have so held. *Lagow* v. *United States*, 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858; *Grainger* v. *United States*, 158 F. 2d 236, 237 (C.A. 4); *Hall* v. *United States*, 150 F. 2d 281, 283 (C.A. 5), certiorari denied, 326 U.S. 741; *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *Mathews* v. *Correa*, 135 F. 2d 534, 537 (C.A. 2); *Kitt* v. *United States*, 132 F. 2d 920, 921-922 (C.A. 4); *United States* v. *Reiburn*, 127 F. 2d 525, 526 (C.A. 2); *Ingram* v. *United States*, 113 F. 2d 966, 967-968 (C.A. 9); *Lewis* v. *United States*, 92 F. 2d 952, 953 (C.A. 10); *Bushouse* v. *United States*, 67 F. 2d 843, 844 (C.A. 6); *Kelley* v. *United States*, 61 F. 2d 843, 845-846 (C.A. 8); *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (C.A. 2); *Shore* v. *United States*, 49 F. 2d 519, 522 (C.A. D.C.); certiorari denied, 283 U.S. 865; *Chepo* v. *United States*, 46 F. 2d 70, (C.A. 3); *Winslett* v. *United States*, 43 F. 2d 358, 359 (C.A. 10); *Holt* v. *United States*,

This Court, in *Goldstein v. United States*, 316 U.S. 114, in holding that one who was not a party to an illegally intercepted telephone communication had no standing to object to the admission of evidence obtained by the interception, recognized and, by analogy, applied this rule. After stating that it had applied the same policy to the prohibitions of the Federal Communications Act as to the Fourth Amendment under the *Weeks* doctrine, this Court said, at p. 121:

> * * * While this court has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.[5] * * * We think no broader sanction should be imposed upon the Government in respect of violations of the Communication Act.

The Court, in reaching its decision in reliance on the search and seizure rule of the lower federal courts, necessarily approved the rule.

The suppression rule arose from a motion to compel the return of property wrongfully seized.

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42 F. 2d 103, 105 (C.A. 6); *Graham* v. *United States*, 15 F. 2d 740, 742 (C.A. 8); *Klein* v. *United States*, 14 F. 2d 35, 36 (C.A. 1); *Haywood* v. *United States*, 268 Fed. 795, 803-804 (C.A. 7), certiorari denied, 256 U.S. 689.

[5] In a footnote the Court said: "The principle has been applied in at least fifty cases by the Circuit Courts of Appeals in nine circuits, and in the Court of Appeals for the District of Columbia, not to mention many decisions by District Courts. * * *."

Weeks v. *United States, supra.* Manifestly, a person has no standing to seek the return of property in which he has no proprietary or possessory interest (*Shields* v. *United States,* 26 F. 2d 993, 996 (C.A. D.C.)), nor "to ask for the return of the property to a third person." *Kelleher* v. *United States,* 35 F. 2d 877, 879 (C.A. D.C.). The rationale of the *Weeks* doctrine, however, was broader. It was based on the theory that suppression of evidence seized in violation of the constitutional rights of the accused is necessary to vindicate the right invaded.[6]

While this Court has indicated that the *Weeks* doctrine may not be a requirement of the Fourth Amendment and might be abrogated by legislation (*Wolf* v. *Colorado,* 338 U.S. 25, 33), the doctrine was, nevertheless, grounded on an invasion of the personal constitutional rights of the accused. See fn. 6, *supra.* The Court held that the papers "were taken from the house of the accused * * * in direct violation of the constitutional rights of the defendant" and that the refusal to return them was

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[6] 232 U.S. at 393: "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises. * * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

"a denial of the constitutional rights of the accused" (232 U.S. at 398). Consequently, even though an accused cannot secure the return of the objects seized, the evidence is suppressed as to a person whose rights of privacy under the Fourth Amendment have been violated. See *Dodge* v. *United States*, 272 U. S. 530, 532; Rule 41, F. R. Crim. P. As the Court phrased it in *Goldstein* v. *United States, supra*, 316 U.S. at 120, "evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure * * * for the reason that otherwise the policy and purpose of the amendment might be thwarted."[7]

Suppression, being a remedial measure, is not a punitive one. Its purpose is not to discipline the Government or its police officers but to vindicate a right. The Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, said in *Connolly* v. *Medalie*, 58 F. 2d 629, 630:

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[7] See also *Agnello* v. *United States*, 269 U.S. 20, where the court allowed the judgment against Agnello's codefendants to stand while reversing as to Agnello because of the admission of evidence illegally seized from his home. While the Court indicated that the illegally seized evidence had not been introduced against the codefendants, in affirming the judgment as to the codefendants, it said that "The introduction of the evidence of the search and seizure did not transgress their constitutional rights" (269 U.S. at 35). In *McGuire* v. *United States*, 273 U.S. 93, although the search and seizure were valid, the officers illegally destroyed liquor belonging to the accused during the search. The Court held that the evidence was properly admitted because "neither the seizure of this liquor nor its use as evidence infringed any constitutional immunity of the accused" (273 U.S. at 100).

> * * * The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means to conviction. The relief being thus remedial, the evidence has never been thought incompetent against anyone but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong (Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A.L.R. 1159), should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless. * * *

The rule requiring suppression of evidence is an exception to the general principle that relevant evidence will be considered no matter how it was obtained. *Olmstead* v. *United States,* 277 U.S. 438, 466-469. The exception has never been extended beyond the point necessary to protect the person whose rights have been violated. See, *Goldstein* v. *United States, supra,* 316 U. S. 114. Cf. *McGuire* v. *United States, supra,* 273 U. S. 93, where, as noted above, it was held that an illegal and oppressive act by police officers during the search did not entitle the accused to suppress evi-

dence legally seized. "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches" (*Wolf* v. *Colorado, supra,* 338 U. S. at 31), it is still true, as this Court said in another context in *United States* v. *Mitchell,* 322 U. S. 65, 70-71, where it held that subsequent illegal conduct by police officers did not vitiate a valid confession previously obtained:

> * * * [The Court's] duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

The principle that only the person who has a privilege may assert it is applied to other personal rights. As noted above, this Court, on the authority of the Fourth Amendment cases, held that only the person whose privacy had been invaded could complain of illegal wire tapping. *Goldstein* v. *United States,* 316 U. S. 114. If a witness waives his Fifth Amendment privilege against self-incrimination or the court requires him to answer, a party to the action cannot interfere or complain of the answer. *Morgan* v. *Halberstadt,* 60 Fed. 592, 596-597 (C.A. 2), certiorari denied, 154 U. S. 511. Cf. *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361. If the owner of incriminating documents chooses to waive his constitutional rights and turn them over to the Government, another person implicated by such documents would have no standing to object. By the

same token, had respondent's aunts given the officer permission to search their room, respondent would have had no right to complain of the search. The invasion of his aunts' privacy is no more relevant to the question of his rights than his aunt's consent. If his own personal rights were not violated, he cannot rely upon the wrong to another to escape just punishment.[8]

B. *The search of the apartment of respondent's aunts, which did not invade his privacy, does not entitle him to have the seized evidence suppressed.* —Applying the rule discussed above, that only a person whose constitutional rights have been in-

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[8] Rule 41(e), F.R. Crim. P., providing that a "person aggrieved by an unlawful search and seizure may move" to suppress evidence thus obtained, was "a restatement of existing law and practice" (Notes of Advisory Committee). A contention was made in *Lagow* v. *United States*, 159 F. 2d 245 (C.A. 2), certiorari denied, 331 U.S. 858, that the rule had changed the law, to which the Second Circuit replied, at p. 246:

"* * * Nor, with deference can we accept the ruling in *United States* v. *Janitz*, D.C., 6 F.R.D. 1, that Rule 41(e) of the Rules of Criminal Procedure, 18 U.S.C.A. following section 687, has changed the law. The committee expressly declared that they had no intention of doing so; nor is there anything in the text to force us to defeat that intention. We readily read the phrase, 'A person aggrieved,' in the rule to cover only those persons who had been deemed 'aggrieved' before."

The Third Circuit held that the appeal of the *Janitz* case did not bring the question before it, saying (*United States* v. *Janitz*, 161 F. 2d 19, 21, fn. 3):

"* * * Had the evidence been admitted and the defendants been convicted an appeal by them would have brought this question squarely before us. In the meantime, it has been answered briefly, but with complete clarity, by the Second Circuit in *Lagow et al.* v. *United States*, 2 Cir. 1946, 159 F. 2d 245, in a manner contrary to the ruling of the learned District Judge."

vaded has the right to have illegally seized evidence suppressed, it is clear that, as all the judges below agreed (R. 41, 46, 49), the search of his aunts' hotel room did not invade respondent's privacy and did not give him standing to suppress the evidence seized by the officer.

The uncontradicted testimony of respondent's aunt was that the hotel room where the narcotics were seized was rented and occupied by the two aunts. They paid the rent and theirs were the only names listed on the hotel register. (R. 8, 13, 20.) Respondent occupied another room on a different floor of the hotel. He had a key to his aunts' room and sometimes went there to leave money for the care of his child or to visit his aunts. (R. 9-11, 21.) The aunt testified that he had to have the key, since she and her sister were often away, in order to leave money and clothes for his child (R. 10). She also testified that respondent was not given permission to store narcotics in their apartment, and she was not aware that he had done so (R. 11).

The evidence is clear that respondent had no possessory or proprietary interest in the room searched and that he did not live with his aunts. He must, at least, be dwelling in the room in order to have standing to object to the search.[9] At the

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[9] *Hall* v. *United States*, 150 F. 2d 281, 283 (C.A. 5); *Schnitzer* v. *United States*, 77 F. 2d 233, 235 (C.A. 8); *United States* v. *Conoscente*, 63 F. 2d 811 (C.A. 2), certiorari denied, *sub nom. Conoscente* v. *United States*, 290 U.S. 642; *Kelley* v. *United States*, 61 F. 2d 843, 846 (C.A. 8); *United States* v. *Crushiata*, 59 F. 2d 1007 (C.A. 2); *Winslett* v. *United States*,

most, respondent merely had a license to enter the room as a guest, an insufficient interest to give him standing to object. It has been held, not only that a guest [10] or employee actually present at the time of the search [11] has no standing to complain, but that an employee in sole custody and control of the premises is in the same position.[12] The rule has also been applied to a person who was permitted to use a room when he happened to be there but was not present at the time of the search.[13]

The Fourth Amendment prohibition against un-

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43 F. 2d 358 (C.A. 10); *Coon* v. *United States*, 36 F. 2d 164, 165 (C.A. 10); *United States* v. *Messina*, 36 F. 2d 699, 700-701 (C.A. 2); *Patterson* v. *United States*, 31 F. 2d 737 (C.A. 9); *Cantrell* v. *United States*, 15 F. 2d 953, 954 (C.A. 5), certiorari denied, 273 U.S. 768; *Graham* v. *United States*, 15 F. 2d 740, 742 (C.A. 8); *Rosenberg* v. *United States*, 15 F. 2d 179 (C.A. 8); *Lewis* v. *United States*, 6 F. 2d 222 (C.A. 9); *Tritico* v. *United States*, 4 F. 2d 664 (C.A. 5). Cf. *Alvau* v. *United States*, 33 F. 2d 467, 470 (C.A. 9), where it was held that a guest or employee of the owner had standing to object to the search where he for the time being "was domiciled in the residence."

[10] *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A. D.C.), certiorari denied, *sub nom. O'Kelley* v. *United States*, 326 U.S. 724; *In re Nassetta*, 125 F. 2d 924, 925 (C.A. 2); *Kwang How* v. *United States*, 71 F. 2d 71, 75 (C.A. 9).

[11] *United States* v. *Dellaro*, 99 F. 2d 781, 782 (C.A. 2); *Mello* v. *United States*, 66 F. 2d 135, 136 (C.A. 3); *United States* v. *Conoscente*, 63 F. 2d 811 (C.A. 2), certiorari denied, *sub nom. Conoscente* v. *United States*, 290 U.S. 642; *United States* v. *Muscarelle*, 63 F. 2d 806 (C.A. 2), certiorari denied, *sub nom. Muscarelle* v. *United States*, 290 U.S. 642; *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C.A. 2); *Kelley* v. *United States*, 61 F. 2d 843, 845 (C.A. 8); *Wida* v. *United States*, 52 F. 2d 424, 426 (C.A. 8); *United States* v. *Messina*, 36 F. 2d 699 (C.A. 2).

[12] *United States* v. *Crushiata*, 59 F. 2d 1007 (C.A. 2); *Connolly* v. *Medalie*, 58 F. 2d 629, 630 (C.A. 2).

[13] *Calhoun* v. *United States*, 172 F. 2d 457, 458 (C.A. 5), certiorari denied, 337 U.S. 938.

reasonable searches is a protection of privacy. Since respondent did not live in the room, certainly it cannot be said that the search invaded his privacy. He did not have the necessary interest in the room to give permission to search it, nor could he complain of the search had the aunts consented to it. He has no more standing to complain because their permission was not obtained.

II

The Seizure of the Contraband Narcotics Without a Warrant But Without Invading Respondent's Person or Privacy, Does Not Give Him Standing To Have the Seized Evidence Suppressed

The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures. See Mr. Justice Frankfurter, dissenting in *Harris* v. *United States*, 331 U. S. 145, 165-166; Mr. Justice Miller, concurring in *Boyd* v. *United States*, 116 U. S. 616, 641. The former protects the individual's privacy; the latter, possession of his property. There was, as we have shown, no invasion of respondent's privacy. Considered in relation to any possible rights of respondent, the only significant act is the bare seizure without a warrant of the contraband narcotics.

While this Court has held that the victim of an illegal search, *i.e.*, one whose privacy has been invaded, has standing to suppress evidence of contra-

band seized in the course of the search,[14] it has never held that the seizure of contraband without a warrant, in and of itself, violates the Fourth Amendment rights of an accused. As discussed in Point I, where contraband is seized as the result of a search violating the constitutional rights of an accused, the contraband is suppressed as evidence, even though the accused is not entitled to return thereof, as a means of vindicating the invaded right of privacy. The rule is based on the principle that even a wrong-doer has rights of privacy guaranteed by the Fourth Amendment and such rights must be adequately protected. The question is very different, however, when the only interest invaded is an interest in contraband, *i. e.*, property outside the protection of the law. The question is then whether a warrant is necessary to seize such property and whether a claim of ownership of such contraband is an interest entitled to protection under the Fourth Amendment to be vindicated by the extraordinary remedy of suppression. It is the Government's position that throughout the years, at common law, and under the decisions of this Court and of lower federal courts, the possessor of contraband has no pro-

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[14] *Lustig* v. *United States*, 338 U.S. 74; *Johnson* v. *United States*, 333 U.S. 10; *Nathanson* v. *United States*, 290 U.S. 41; *Sgro* v. *United States*, 287 U.S. 206; *Grau* v. *United States*, 287 U.S. 124; *Taylor* v. *United States*, 286 U.S. 1; *Gambino* v. *United States*, 275 U.S. 310; *United States* v. *Berkeness*, 275 U.S. 149; *Byars* v. *United States*, 273 U.S. 28; *Agnello* v. *United States*, 269 U.S. 20; *Amos* v. *United States*, 255 U.S. 313.

tected right therein and that when the seizure of such property is unaccompanied by an invasion of personal rights, it may be made without a warrant. Hence the seizure of such property without a warrant, in and of itself, did not violate a right protected by the Fourth Amendment, and respondent is not entitled to have the property suppressed as evidence.

A. *At common law the seizure of contraband would not support an action for trespass although the invasion of a personal right by the manner of making the seizure could be redressed.*

At common law anyone could seize contraband for the government, and he was completely justified if the government adopted the seizure and the goods were condemned. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310, 315-316, and cases cited; *Taylor* v. *United States*, 3 How. 197, 205; *Scott* v. *Shearman*, 2 Black. W. 977, 980 (K.B. 1775). Nor could an action be maintained for the seizure even if the contraband goods were not later condemned. *De Gondouin* v. *Lewis*, 10 Ad. & E. 117 (K.B. 1839). In the *Scott* case, a unanimous decision that trespass would not lie, after a sentence of condemnation, against the officer who seized the contraband, Blackstone, J., said (2 Black. W. at 980):

> * * * For the condemnation has a retrospect and relation backwards to the time of the seizure. The spirituous liquors that were seized were therefore, at the time of the seiz-

> ure, the goods and chattels of His Majesty, and not of the plaintiff, as in his declaration he has (necessarily) declared them to be; since neither trespass nor trover will lie for taking of goods, unless at the time of the taking, the property was in the plaintiff.[15]

Early American cases, during the period immediately following the adoption of the Fourth Amendment, reflect the same point of view. In *Gelston* v. *Hoyt*, 3 Wheat. 246 (1818), the Court, although holding that officers sued for trespass in seizing a ship could not go behind a prior decision that the ship was not forfeited, expressed no doubt that, had the ship actually been forfeited, the seizure would have been valid. Mr. Justice Story, speaking for the Court, stated (pp. 310-311):

> * * * 4. That the defendants, as officers of the customs, had a right to make the seizure. Upon the last point, there does not seem to be much room for doubt. At common law, any person may, at his peril, seize for a forfeiture to the government; and if the govern-

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[15] See *Davis* v. *United States*, 328 U.S. 582, where, in pointing out the distinction "between property to which the Government is entitled to possession and property to which it is not," this Court said, at p. 591:

"* * * * an owner of property who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful. *Richardson* v. *Anthony*, 12 Vt. 273; *Madden* v. *Brown*, 8 App. Div. 454, 40 N.Y.S. 714; *State* v. *Dooley*, 121 Mo. 591, 26 S.W. 558."

ment adopt his seizure, and the property is condemned, he will be completely justified; and it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture. (Hale on the Customs, Harg. Tracts, 227. *Roe* v. *Roe,* Hardr. R. 185. *Malden* v. *Bartlett,* Parker, 105; though *Horne* v. *Boosey,* 2 Str. 952, seems *contra.*). * * * Upon the general principle, then, which has been above stated, and upon the express enactment of the statute, the defendants, supposing there to have been an actual forfeiture, might justify themselves in the seizure. There is this strong additional reason in support of the position, that the forfeiture must be deemed to attach, at the moment of the commission of the offence, and consequently, from that moment, the title of the plaintiff would be completely devested, so that he could maintain no action for the subsequent seizure. This is the doctrine of the English courts; and it has been recognised and enforced in this court, upon very solemn argument. (*United States* v. *1960 Bags of Coffee,* 8 Cranch 398; *The Mars, Ibid.* 417; *Roberts* v. *Witherhead,* 12 Mod. 92; Salk. 223; *Wilkins* v. *Despard,* 5 T.R. 112.)

The early English cases recognized a distinction between a possible invasion of a personal right which would be vindicated by an action in trespass attacking the manner in which contraband was seized and the absence of such invasion in the act

of seizing itself. Thus, in *De Gondouin* v. *Lewis, supra* (K.B. 1839), where a customs officer forcibly took, without a previous demand, a portfolio containing drawings, liable to seizure for non-payment of duty, from a passenger while passing ashore from a ship, it was held that an action of trespass for taking and detaining the portfolio and drawings would not lie, since the drawings were forfeited contraband and "undoubtedly liable to seizure" (10 Ad. & E. at 120), even though they were returned and were not condemned; but the court stated that, had the plaintiff sued for the assault, he would have recovered, for that was illegal. In *Davis* v. *Nest*, 6 C. & P. 167 (nisi prius, K. B. & C. P., 1883), an action for trespass for breaking and entering a house without a warrant and taking contraband goods, it was held that the plaintiff could recover for breaking and entering the house, but not for taking the goods, for he had no property in them.

While these cases were decided after the adoption of the American Constitution, they clearly reflect the general legal thinking of the period preceding the adoption of the Fourth Amendment. They hold that the violation of a personal right may be redressed but that a claim to an interest in contraband is not such a right.

B. *The framers of the Fourth Amendment did not regard a warrant as necessary for the seizure of forfeited goods.*

The particular grievance out of which the Fourth Amendment arose was the English practice of issuing general warrants to enable officers to search for goods which had been imported in violation of the law or without paying duty. See *Boyd* v. *United States,* 116 U.S. 616; dissenting opinion of Mr. Justice Frankfurter in *Harris* v. *United States,* 331 U.S. 145, 155; see also *Life and Works of John Adams,* Vol. II, App. A, pp. 523-525; Vol. X, pp. 233, 246. When the First Congress, which proposed the first ten amendments to the state legislatures, passed two acts for the collection of duties (Acts of July 31, 1789, 1 Stat. 29, and August 4, 1790, 1 Stat. 145), the recent experience with the collection of British duties and the necessity of avoiding the conduct regarded as oppressive which gave rise to the Fourth Amendment, must necessarily have been in the minds of the legislators.[16] Yet both acts provided for the seizure of forfeited goods without a warrant.

The Act of July 31, 1789, contained numerous provisions for forfeiture of goods imported in vio-

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[16] One of the principal issues in the debates in the House of Representatives on the tariff bill was whether the Government could successfully collect the duties and prevent smuggling, in view of the recent abortive attempt by England to collect duties on goods imported into the colonies. Annals of Congress, Vol. I, pp. 285-317.

lation of the duties (sections 12, 22, 34, 40) and, in some cases, for forfeiture of the ship (sections 12, 34, 40). It also authorized and required customs officers to seize such goods or ships (sections 12, 23, 24, 26, 34). Section 24 provided:

> That every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and if they shall have cause to suspect a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial; and all such goods, wares and merchandise, on which the duties shall not have been paid or secured, shall be forfeited.[17]

[17] The Act of August 4, 1790, did not differ from the 1789 act in any respect material here. It likewise provided for the forfeiture of goods imported in violation of the act (sections 13, 22, 27, 28, 46, 47, 60) and sometimes the ship (sections 14, 27, 60), authorized the customs officials to seize them (sections 27, 28, 46, 47, 48, 50), and contained a provision like section 24 (section 48). Similar provisions were made by the acts of February 18, 1793 (1 Stat. 305), and March 2, 1799 (1 Stat. 627).

This section, although requiring a warrant to enter and search buildings, specifically authorized entry and search of ships for forfeited goods, and the seizure of such goods found there, without a warrant. The purpose of this section was to give the officers authority to enter and search for the goods, for other sections authorized them to seize forfeited goods.[18] E.g., section 12 provided that any goods landed or discharged at night or without a permit from the collector "shall become forfeited, and may be seized by any officer of the customs." Although it appears that the act contemplated situations where the goods would not be concealed, it is silent about a warrant for the seizure of forfeited goods where no search was necessary. As we have pointed out, goods illegally landed or discharged could be seized (section 12). And section 40 declared that all goods illegally brought into the country by land together with the carriages, horses and oxen conveying them shall be forfeited. Section 26 made it the duty of custom officers to seize forfeited goods outside, as well as within, their

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[18] That the power of the customs officers to seize contraband was thought to be distinct from their power to enter and search for them is shown by section 8 of the Non-intercourse Act of March 1, 1809, 2 Stat. 528, 530:

"* * * That every * * * officer of the customs, shall have the like power and authority to seize goods, wares and merchandize imported contrary to the intent and meaning of this act, * * * and to enter any ship or vessel, dwelling-house, store, building or other place, for the purpose of searching for and seizing any such goods, wares and merchandize which he or they now have by law in relation to goods, wares and merchandize subject to duty * * *."

districts.[19] We think it is apparent from reading the entire act that no one questioned the right of officers to seize forfeited goods without a warrant where no entry or search was necessary. It is significant that nowhere in the reported debates on this act or the Fourth Amendment is there any indication that possible conflict between the two occurred to anyone.[20] The seizure of contraband without a warrant, without invading person or privacy, was probably not thought to be an unreasonable seizure because, as shown in Section A, it was recognized by English law.

C. *The courts have consistently upheld the seizure of contraband without a warrant where the claimant's right of privacy has not been unlawfully invaded.*

This Court has always recognized that where an officer has lawfully come upon property which is contraband in the true sense, the officer may seize it without a warrant. *Harris* v. *United States,* 331 U.S. 145; *Steele* v. *United States No. 1,* 267 U.S. 498; see *Davis* v. *United States,* 328 U.S. 582; *Zap* v. *United States,* 328 U.S. 624.

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[19] See *King* v. *Barfoot,* 13 East. 506 (K.B. 1811), where it was held that customs officers could, under a similar English statute, legally seize contraband (handkerchiefs, a carriage and two horses) without a warrant outside, as well as within, their districts.

[20] Constitutional amendments: Annals of Congress, Vol. I, pp. 424-450, 660-665, 703-762, 766-778; collection of duties: Annals of Congress, Vol. I, pp. 367, 417-424, 450-453, 619-621. See, also, debates on Tariff bill, Annals of Congress, Vol. I, pp. 285-317.

On the last theory, the seizure of draft cards, turned up in the course of a lawful search, was upheld in the *Harris* case, although the agents were not searching for them. In the *Steele* case, a search, pursuant to a warrant authorizing search of the premises for a number of cases believed to contain whisky, disclosed, and the agents seized, not only 150 cases of whisky, but also 92 bags of whisky, a 5-gallon can of alcohol, 66 cases of gin, six 5-gallon jugs of whisky, 102 quarts of whisky, two 50-gallon barrels of whisky, and a corking machine. This Court held that the property was lawfully seized, and affirmed a decree holding that it should not be returned.

Lower federal courts have consistently followed the same rule: *Bennett* v. *United States*, 145 F. 2d 270 (C.A. 4), certiorari denied, 323 U.S. 788 (search warrant for counterfeiting apparatus justifies seizure of counterfeit ration coupons); *In re 14 East 17th Street*, 65 F. 2d 289 (C.A. 2) (smuggled goods discovered after entry by consent); *Paper* v. *United States*, 53 F. 2d 184 (C.A. 4) (liquor found during search for defendant whose arrest was sought on a bench warrant); *United States* v. *Two Soaking Units, Etc.*, 48 F. 2d 107 (C.A. 2), certiorari denied, 284 U. S. 627 (contraband discovered during lawful inspection); *Hilsinger* v. *United States*, 2 F. 2d 241 (C.A. 6), certiorari denied, 266 U.S. 622 (same); *United States* v. *Jankowski*, 28 F. 2d 800 (C.A. 2) (liquor

found in car being stopped to notify driver to fix headlights); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736 (C.A. 2) (seizure of 4867½ cases of various kinds of intoxicating liquor held proper under search warrant for 10 or 12 barrels of liquor); *Milam* v. *United States*, 296 Fed. 629 (C.A. 4), certiorari denied, 265 U.S. 586 (aliens unlawfully in United States discovered in truck stopped on reasonable belief it was carrying liquor); *United States* v. *Charles*, 8 F. 2d 302 (N.D. Calif.) (liquor seized in course of search for narcotics); *United States* v. *Seltzer*, 5 F. 2d 364 (D. Mass.) (counterfeit bond strip label stamps seized in search for liquor); *United States* v. *Camarota*, 278 Fed. 388 (S.D. Calif.) (still seized in search for liquor).

An officer may also, without a warrant, seize contraband discovered while trespassing on the open premises of the accused or of another. In *Hester* v. *United States*, 265 U.S. 57, this Court held that the special protection accorded by the Fourth Amendment does not extend to a search of open fields and contraband found therein may be seized.[21] Manifestly there is more reason for pro-

[21] See also, to the same effect, *Martin* v. *United States*, 155 F. 2d 503, 505 (C.A. 5); *United States* v. *Feldman*, 104 F. 2d 255, 256 (C.A. 3), certiorari denied, *sub nom. Feldman* v. *United States*, 308 U.S. 579; *Schnitzer* v. *United States*, 77 F. 2d 233 (C.A. 8); *Safarik* v. *United States*, 62 F. 2d 892 (C.A. 8); *Stark* v. *United States*, 44 F. 2d 946 (C.A. 8); *Koth* v. *United States*, 16 F. 2d 59 (C.A. 9); *Tritico* v. *United States*, 4 F. 2d 664 (C.A. 5); *United States* v. *McBride*, 284 Fed. 416 (C.A. 5), affirming 287 Fed. 214 (S.D. Ala.), certiorari denied, 261 U.S. 614.

tecting open premises from unlimited search than there is for protecting the possession of contraband.

The rationale of these cases has frequently been that, since the possession of contraband is criminal, a crime was being committed in the officer's presence, and in such a case, he can seize the instrumentalities of the crime. But some have held that, there being no violation of the privacy of the accused, seizure of the contraband was not an unreasonable seizure within the meaning of the Fourth Amendment. Thus, in *United States* v. *Old Dominion Warehouse, supra,* Judge Learned Hand, speaking for the court, said (10 F. 2d at 738):

> * * * As we read the warrant, the question does not arise of any lack of particularity in its terms. They were specific enough; they directed Grill to seize the liquors described in his affidavit, and only those. All formal requisites were observed, and the supposed vice of the seizure goes deeper; it was without any warrant at all. And so, strictly speaking, it was; but the entry was lawful, and, as we view it, it is only that that the Search Warrant Act regulates. Once in, the question is whether the officer's added seizure was "unreasonable" under the Fourth Amendment. We think that it was not. If we suppose the case of goods which we are more used to thinking of as inherently contraband, like a burglar's kit, or counterfeiting paraphernalia, the case appears to us plain. We cannot suppose that, if an of-

ficer entered lawfully upon a warrant limited to certain described articles of this kind, he would not be justified in taking without warrant any others which he might chance upon in the premises. His seizure would not depend upon the warrant, but upon the fact that they were in their nature caput lupi; it would be as little an "unreasonable seizure" as to take property from a person arrested. Indeed, this seems to us a fair inference from Carroll v. U.S., 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790, where the seizure without warrant of liquor from a motorcar was sustained. Thus we think that the Search Warrant Act has no application to the seizure of so much of the liquors as were not contained in the barrels, and that the Fourth Amendment does not touch the case, because the added seizure was not "unreasonable"; the liquors being inevitably unlawfully possessed. * * *

Similarly, the Sixth Circuit in *Hilsinger* v. *United States, supra,* stated (2 F. 2d at 243):

* * * If a lawful search, made by prohibition agents, discloses the existence, upon the premises which they are rightfully examining, of property which has come into existence through violation of law, so that the possessor has, under the express terms of the law, no property right in it, we can see nothing unreasonable, under any proper construction of the Fourth Amendment, in seizing that same property.

The holding of the court below that contraband comprehends property rights protected against seizure without a warrant conflicts in principle with the cases cited above. For the invasion of the alleged property rights of the owner of contraband where an officer seizes it without a warrant after lawfully finding it does not differ from that where the officer, in order to reach it, has illegally searched the premises of a third party. Once the principle is recognized that a person has standing to complain only of an invasion of his personal rights, it becomes clear that respondent is in no different position than he would have been if the narcotics had been discovered in the course of a lawful search for other property (*Harris* v. *United States*, 331 U.S. 145; *Steele* v. *United States No. 1*, 267 U.S. 498) or a search of open fields (*Hester* v. *United States*, 265 U.S. 57). The entry and search was an act of which respondent has no standing to complain; the seizure is one of which he has no right to complain.

D. *Congress has explicitly declared that there can be no property rights in contraband narcotics.* —In *United States* v. *1960 Bags of Coffee*, 8 Cranch 398, this Court held that, under a statute providing that goods imported in violation of the act "shall be forfeited," [22] the forfeiture took place upon the

[22] Act of March 1, 1809, Sec. 5 (2 Stat. 528, 529): "That whenever any article or articles, the importation of which is prohibited by this act, shall * * * be imported into the United States * * * or * * * be put on board of any ship or vessel,

commission of the offense, and a subsequent sale to an innocent purchaser was void. The Court has consistently followed this holding. *United States* v. *Stowell*, 133 U.S. 1; *Thacher's Distilled Spirits*, 103 U.S. 679; *Henderson's Distilled Spirits*, 14 Wall. 44; *Caldwell* v. *United States*, 8 How. 366; *Wood* v. *United States*, 16 Pet. 342, 362; *Gelston* v. *Hoyt*, 3 Wheat. 246, 311; *The Mars*, 8 Cranch 417.[23] The rule of these cases is set forth in the *Stowell* case as follows (133 U.S. at 16-17):

> By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

The title to the forfeited goods passes to the Government at the time the act is committed; the for-

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raft or carriage, with intention of importing the same into the United States, * * * all such articles * * * shall be forfeited * * *.

[23] Where the statute provides for the forfeiture of the goods *or their value*, there is no forfeiture until the government has made an election. *Caldwell* v. *United States*, 8 How. 366; *United States* v. *Grundy and Thornburgh*, 3 Cranch 337.

feiture proceeding is merely a judicial determination that the goods have been forfeited, not an action to transfer title.

The instant case is even clearer than those cited. The statutes declare that the acquisition of unstamped narcotics is unlawful,[24] that no property rights shall exist therein,[25] and that they are subject to seizure and forfeiture.[26] The acquisition of such narcotics is a crime.[27] These laws are common knowledge. Despite them, respondent acquired some unstamped narcotics, and asserts that his unlawful act gave him property rights protected by the Fourth Amendment. This is not a case where Congress, after the acquisition, destroyed property rights belonging to respondent; these laws were in effects when he obtained the narcotics. Nor is this a case where respondent once had property rights which were transferred to the Government by his illegal act. Respondent never at any time had title to the narcotics which he obtained in direct defiance of the law. Nothing in the statute declaring that no property rights exist in unstamped narcotics indicates that they embrace such rights within the meaning of the Fourth Amendment. That amendment protects only the people's security in "their persons, houses, papers, and effects." Since respondent never acquired title

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[24] 26 U.S.C. 2553(a), *supra*, p. 3.
[25] 26 U.S.C. 3116, *supra*, p. 4.
[26] 26 U.S.C. 2558(a), *supra*, p. 4.
[27] 26 U.S.C. 2557(b)(1) *supra*, p. 3.

to the contraband narcotics, they never were his "effects" within the protection of the Fourth Amendment. The only possible interest of respondent disturbed by the action of the officer in seizing the narcotics was his illegal possession. Since he had secreted them in his aunts' apartment without their consent, he did not have actual possession of them, but even if he had possession, it was illegal and criminal, and the Government was entitled to possession.

Not even all property rights are protected by the Fourth Amendment. As noted above, this Court held in *Hester* v. *United States*, 265 U.S. 57, that the Fourth Amendment does not protect against trespasses on open fields. Certainly illegal possession is not entitled to such protection. Thus it has been held that a tresspasser's possession of premises is not protected by the Fourth Amendment. *Klee* v. *United States*, 53 F. 2d 58, 59 (C.A. 9); *Stakich* v. *United States*, 24 F. 2d 701, 702 (C.A. 9); *Chicco* v. *United States*, 284 Fed. 434, 436-437 (C.A. 4). Much less was it intended to protect a possession which is a continuing crime We submit that the dissenting judge below properly held that, neither respondent's "premises nor his person being invaded, he had no protected property right in the unstamped narcotics, they being instrumentalities of crime and *prima facie* intended for such use and *prima facie* being so used" (R. 49). The case is even stronger. The narcotics were goods in

which Congress has explicitly declared that no private person can possess property rights. The courts should not be required to protect an interest in such goods.

The majority below, in holding that for purposes of standing to object to their admission in evidence respondent was the owner of the contraband narcotics (R. 45), reasoned that the statutory provisions making unstamped narcotics subject to seizure and to forfeiture and declaring that no property rights exist in them were not intended to affect the evidence rule of the *Weeks* case (R. 44). But the concept of contraband goods, forfeited to the Government, did not come into the law with the passage of these statutes; it existed in the English law long before the Fourth Amendment was adopted. *Boyd* v. *United States, supra,* 116 U.S. 616, 623. As we have shown, the First Congress provided for the forfeiture of goods imported in violation of the tariff laws. It cannot be questioned that Congress could validly make unstamped narcotics forfeited contraband, as to which there could be no property rights. See *United States* v. *1960 Bags of Coffee, supra,* 8 Cranch 398. Congress having done that, the narcotics are entitled to no greater protection than other contraband. The question is not whether Congress intended to change the evidence rule; it is whether the Fourth Amendment protects an individual's illegal possession of contraband narcotics against the Gov-

ernment, which is entitled to their possession where, in order to gain possession, the Government did not invade that individual's person or premises.

It is, of course, true, as the opinion of Judge Fahy below states, that section 3116 of Title 26, after declaring the possession of liquor or property intended for use in violation of the revenue laws to be unlawful and that no property rights shall exist therein, provides for the issuance of a search warrant under the Act of June 15, 1917, for the seizure of such property. That section, however, applies only where a search must be made to seize; it and its precursors have never been interpreted as requiring a warrant to seize contraband where the officer comes upon it without an unlawful search.[28]

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[28] *Steele* v. *United States, No. 1*, 267 U.S. 498; *Cardinal* v. *United States*, 79 F. 2d 825, 826 (C.A. 6); *Smallwood* v. *United States*, 68 F. 2d 244, 246 (C.A. 5); *Carvalho* v. *United States*, 54 F. 2d 232, 233 (C.A. 1); *Wida* v. *United States*, 52 F. 2d 424 (C.A. 8); *Todd* v. *United States*, 48 F. 2d 530, 532 (C.A. 5); *Crace* v. *United States*, 44 F. 2d 894, 895 (C.A.D.C.); *Benton* v. *United States*, 28 F. 2d 695, 697 (C.A. 4); *Avignone* v. *United States*, 12 F. 2d 509 (C.A. 2); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C.A. 2); *Miller* v. *United States*, 9 F. 2d 382, 383 (C.A. 9); *Sayers* v. *United States*, 2 F. 2d 146, 147 (C.A. 9); *McBride* v. *United States*, 284 Fed. 416 (C.A. 5), certiorari denied, 261 U.S. 614; *Vachina* v. *United States*, 283 Fed. 35, 36 (C.A. 9).

Likewise, the right of seizure of liquor incident to a lawful arrest without resort to a warrant has been recognized and upheld, despite the provision of the statute. *Scher* v. *United States*, 305 U.S. 251; *United States* v. *Feldman*, 104 F. 2d 255 (C.A. 3), certiorari denied, 308 U.S. 579; *Shew* v. *United States*, 155 F. 2d 628, 630 (C.A. 4), certiorari denied, 328 U.S. 870; *Crabb* v. *United States*, 99 F. 2d 325, 327 (C.A. 10).

Since the time of the adoption of the Fourth Amendment, it has always been recognized that, despite the statutory provisions requiring warrants, there are certain situations in which a warrant is not required to search or to seize. Thus, laws requiring search warrants do not affect the historical right of search incident to a lawful arrest (*Rabinowitz* v. *United States,* 339 U.S. 56; *Harris* v. *United States,* 331 U.S. 145) or the right to stop and search a moving vehicle (*Brinegar* v. *United States,* 338 U.S. 160; *Carroll* v. *United States,* 267 U.S. 132). Similarly, search warrant acts do no apply to the right to seize, without a search, contraband property. As pointed out in Section B, *supra,* the very first Congress, which submitted the Fourth Amendment to the States, itself recognized a distinction between the right to seize without a warrant and the necessity for a warrant in order to search. As this Court in effect held in the *Harris* case (331 U.S. 145), the right to seize property to which the Government is entitled to possession, the possession of which is a continuing offense against the laws of the United States, is historically a right outside the field of law regulating search warrants. It is based on the common law rights of the owner to take possession from a person illegally holding it (see *Davis* v. *United States, supra,* 328 U.S. 582, 591) and of anyone to seize forfeited contraband for the Government. *Gelston* v. *Hoyt, supra,* 3

Wheat. at 310-311. Respondent had no property rights in the narcotics and thus no interest for which he can claim the protection of the Fourth Amendment. The narcotics could properly be seized without a warrant.

CONCLUSION

Since petitioner's right of privacy was not invaded by the search and he had no interest in the seized property, we respectfully submit that the judgment of the court below should be reversed.

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